No. 17-204

IN THE

Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062-2000
(202) 463-5337

THEODORE J. BOUTROUS JR.
Counsel of Record
DANIEL G. SWANSON
THEANE EVANGELIS
SAMUEL ECKMAN
ELIZABETH DOOLEY
GIBSON, DUNN & CRUTCHER LLP
Los Angeles, CA 90071-3197
(213) 229-7804
tboutrous@gibsondunn.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE NINTH CIRCUIT'S DECISION VIOLATES *ILLINOIS BRICK* 4

A. Under *Illinois Brick*, Only Direct Purchasers Have Standing To Sue For Treble Damages 4

B. The Decision Below Creates Precisely The Type Of "Exception" To The Direct Purchaser Rule That This Court Has Rejected 6

C. The Ninth Circuit's Decision Will Have Especially Pernicious Effects On E-Commerce 12

II. THIS CASE ILLUSTRATES A GROWING PROBLEM IN ANTITRUST CLASS-ACTION LITIGATION 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

In re ATM Fee Antitrust Litig.,
686 F.3d 741 (9th Cir. 2012) 8

California v. ARC America Corp.,
490 U.S. 93 (1989) 14

In re Fla. Cement & Concrete Antitrust Litig.,
278 F.R.D. 674 (S.D. Fla. 2012) 17

In re Flonase Antitrust Litig.,
284 F.R.D. 207 (E.D. Pa. 2012) 18

Gen. Tel. Co. of Sw. v. Falcon,
457 U.S. 147 (1982) 16

In re Graphics Processing Units Antitrust Litig.,
253 F.R.D. 478 (N.D. Cal. 2008) 17

Hanover Shoe, Inc. v. United Shoe Machinery Corp.,
392 U.S. 481 (1968) 2, 5, 6, 16

Illinois Brick Co. v. *Illinois*,
431 U.S. 720 (1977) ..... *passim*

Kansas v. UtiliCorp United, Inc.,
497 U.S. 199 (1990) ..... *passim*

In re Polyurethane Foam Antitrust Litig.,
314 F.R.D. 226 (N.D. Ohio 2014) 17, 18

Royal Printing Co. v. Kimberly Clark Corp.,
621 F.2d 323 (9th Cir. 1980) 7

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 15

Statutes

28 U.S.C. § 1332(d)(2) 14

Other Authorities

Alexei Alexandrox, *Pass-Through Rates in the Real World: The Effect of Price Points and Menu Costs*, 79 Antitrust L.J. 349 (2013) 15

Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J. 167 (2009) 11

Deborah A. Garza, et al., *Antitrust Modernization Commission Report and Recommendations* 265 (Apr. 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf 10, 15

Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 Antitrust 58 (Summer 2010) 15

Ed Shelley, *The State of Subscriptions on the App Store* (ChartMogul Feb. 5, 2018) 19

Lee F. Berger & Sophie J. Sung, *The Northern District of California Opens Its Doors to the World's Civil Antitrust Disputes* Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 145 (2015) 8

Steven M. Puiszis, *Developing Trends With the Class Action Fairness Act of 2005*, 40 J. Marshall L. Rev. 115 (2006) 14

Vineet Buch, *I/O 2017: Everything new in the Google Play Console*, Android Developers Blog (May 17, 2017) 12

William B. Rubinstein, *Newberg on Class Actions* § 20:12 (5th ed. June 2018) 14, 17

William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 Antitrust L.J. 1 (1999) 17

Worldwide Retail Ecommerce Sales Will Reach $1.915 Trillion This Year, eMarketer (Aug. 22, 2016) 12

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber routinely files amicus briefs in cases, such as this one, that involve novel theories of liability that threaten to expand class action litigation.

In this brief, the Chamber seeks to emphasize that the Ninth Circuit's ruling threatens to severely distort the e-commerce marketplace, where consumers spend trillions of dollars every year. The opinion below is an erroneous and deeply problematic interpretation of this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Left in place, the Ninth Circuit's decision will result in a cascade of new antitrust cases, even in circumstances where no anticompetitive conduct has occurred. The opinion below will significantly increase the cost and complexity of antitrust

---

[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

litigation. This Court should reverse the judgment of the Ninth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, this Court has held that the only entity that may bring a suit for treble damages under Section 4 of the Clayton Act is the direct purchaser of a monopolized good or service. Although the direct purchaser may "pass on" some or all of the monopolistic overcharge to downstream parties in the supply chain, the direct purchaser is the *only* party who may recover under Section 4, and it may recover the *full amount* of the overcharge.

The reasons for this "direct purchaser" rule are three-fold. First, it "eliminate[s] the complications of apportioning overcharges between direct and indirect purchasers," *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 208 (1990), a task which "would often require additional long and complicated proceedings involving massive evidence and complicated theories," *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968). Second, and relatedly, the rule "eliminate[s] multiple recoveries" that might occur if both direct and indirect purchasers could sue for the same anticompetitive overcharge. *UtiliCorp*, 497 U.S. at 212. Third, the Court has determined that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977).

The Ninth Circuit's decision below violates this direct purchaser rule. Respondents allege that Apple monopolizes app-delivery services, but it is the *app developers* who purchase those services directly from Apple in order to sell their apps to respondents, who in turn are the ultimate consumers. App developers bear the full alleged overcharge, which they may then build into the cost of their apps and thereby pass on to end-consumers like respondents. This ability to pass on alleged overcharges is the hallmark of a direct purchaser. Whether app developers choose to pass on some or all of the alleged overcharge is at the discretion of the developers themselves, and nobody else. Respondents, by contrast, do not purchase anything from Apple, and could not pass on the costs of any overcharge even if they wanted to do so. At the same time, the implications of this decision are startling: The Ninth Circuit openly acknowledged the possibility that "Apple [*also*] sells distribution services to app developers within the meaning of *Illinois Brick*" and, "[i]f it d[oes], this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple," as well. Pet. App. 20a. This is precisely the type of result that the Court in *Illinois Brick* sought to avoid.

This case also points to a growing problem with antitrust litigation in federal courts. Although the Court has rejected indirect purchaser claims under *federal* law, it has permitted such actions under *state* law. Since the enactment of the Class Action Fairness Act of 2005 ("CAFA"), however, an increasing number of indirect purchaser class actions are finding their way back onto the federal docket. And federal district courts have certified these classes in cases that raise

serious questions as to whether they are properly enforcing the rigorous requirements of Rule 23, including commonality, predominance, and superiority.

For all the reasons articulated in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, these cases present inherent obstacles to certification under Rule 23. The difficulties of tracing the pass-on of alleged monopoly overcharges are well-documented by this Court's caselaw. But even if there were a case in which pass-on injury could be calculated with accuracy and consistency through a *single* supply chain, it would be all but impossible to replicate the feat across the *multiple* supply chains that are implicated in an indirect purchaser class action. In the context of indirect purchaser class actions, the "nearly insuperable" difficulties presented by such a task justify with special force the Court's refusal "to litigate a series of exceptions" to *Illinois Brick*. *UtiliCorp*, 497 U.S. at 217.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION VIOLATES *ILLINOIS BRICK*

A. Under *Illinois Brick*, Only Direct Purchasers Have Standing To Sue For Treble Damages

Illinois Brick determines which party is the proper plaintiff to allege an antitrust injury. The answer, repeatedly and unequivocally confirmed by this Court, is that only the "direct purchaser[ ]" from the defendant is entitled to sue, for "the full recovery for the overcharge." *Illinois Brick*, 431 U.S. at 735. There must be only "one plaintiff," and never more than one at any other level of the distribution system. *Id.* at 730. This

rule therefore "denies recovery to" indirect purchasers, even though those purchasers "may have been actually injured by antitrust violations." *Id.* at 746.

This "direct purchaser" rule has deep roots in this Court's jurisprudence. It traces its origins to *Hanover Shoe*, a case in which this Court held that a *defendant* may not avoid antitrust liability by contending that the plaintiff passed on the entire cost of the allegedly monopolistic overcharge to the plaintiff's downstream customers. 392 U.S. at 492–93. The Court explained that, because a wide range of considerations normally influence a company's pricing decisions, any attempt to establish the amount of an overcharge that was shifted to indirect purchasers "would normally prove insurmountable." *Id.* at 493.

Then in *Illinois Brick*, the Court recognized the necessary corollary of *Hanover Shoe*'s prohibition of the pass-on defense: An indirect purchaser, who suffered harm when the cost of monopolistic activity was passed on to it by another party, is not permitted to sue. *Illinois Brick*, 431 U.S. at 728. The Court held that "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants." *Ibid.* Were it otherwise, suits by indirect purchasers "would create a serious risk of multiple liability for defendants," because direct and indirect purchasers would be able to sue the defendant for the same conduct. *Id.* at 730. And *Illinois Brick* declined to adopt a rule that would apportion recovery among direct and indirect purchasers because doing so would impose enormous burdens on the courts.

In *UtiliCorp*, the Court rejected a proposal to create an exception to *Illinois Brick* for situations in which it is arguably easier to trace the pass-on of an alleged overcharge to indirect purchasers. 497 U.S. at 208. Declining to sanction such a carve-out, the Court explained that *any* suit by an indirect purchaser requires a determination of whether, absent the alleged illegal conduct, the direct purchaser could have raised its prices. This, the Court explained, was the very inquiry that *Hanover Shoe* had held to be "nearly insuperable." *Id.* at 209 (quoting *Hanover Shoe*, 392 U.S. at 493). As a result, the direct purchaser rule established in *Illinois Brick* is categorical: "[E]ven assuming that any economic assumption underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.* at 217.

B. The Decision Below Creates Precisely The Type Of "Exception" To The Direct Purchaser Rule That This Court Has Rejected

The Ninth Circuit's decision establishes just such an exception to the direct purchaser rule. And although the Ninth Circuit claimed (Pet. App. 21a) that its decision was "compelled by" this Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, it in fact openly invites the precise problems that those cases sought to avoid.

1. In a conventional distribution chain involving an allegedly monopolistic manufacturer, an intermediate manufacturer, one or more distributors, and ultimate consumers, the direct purchaser is "the immediate buyer[ ] from the alleged antitrust violator[ ]."

UtiliCorp, 497 U.S. at 207. In a case like this one, where the defendant offers a platform service to aid app developers in selling their product to consumers, this Court's precedent teaches that the direct purchaser who may sue is the party who bore the "*full amount* of the overcharge" attributable to the defendant's alleged monopolization. *Illinois Brick*, 431 U.S. at 730 (emphasis added). That is, determining that party's injury *does not* require an "attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer." *Id.* at 741.

The Ninth Circuit erred because it flipped the *Illinois Brick* analysis on its head: It mistakenly started with the consumer, and then looked for which party is a proper *defendant*. The Ninth Circuit stated that "[t]he consumer [in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*] did not have standing to sue the manufacturer or the producer, but did have standing to sue the intermediary, whether the intermediate manufacturer or the distributor." Pet. App. 17a. Thus, the Ninth Circuit explained, "[t]he distributor who 'supplies the product directly to' plaintiffs, rather than the producer of the product, is *the appropriate defendant* in an antitrust suit." Pet. App. 19a (quotation marks omitted) (emphasis added).[2]

---

[2] This is not the first time the Ninth Circuit has departed from this Court's precedent. In *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323, 327 (9th Cir. 1980), for example, the Ninth Circuit carved out a similar exception to *Illinois Brick*, allowing indirect purchasers to sue when they purchased allegedly price-fixed products from a direct purchaser who did not conspire but was owned or controlled by an alleged conspirator. Commenta-

In other words, according to the Ninth Circuit, an ultimate consumer who is injured by an antitrust violation always has standing under the Clayton Act to sue *someone*. But that is wrong—the intermediaries in this Court's prior cases did not even allegedly violate the antitrust laws, so there was no claim at all to assert against them. *Illinois Brick* is not, as the Ninth Circuit believed, a search for "the appropriate defendant." Rather, *Illinois Brick* starts with the alleged monopolist—the defendant—and then searches for the appropriate *plaintiff*—the one party that can show it bore the entire amount of the defendant's allegedly monopolistic overcharge, without having the overcharge passed on to it by another party. *See UtiliCorp*, 497 U.S. at 204 (in applying *Illinois Brick*, the Court "must decide *who may sue* under" the antitrust laws) (emphasis added).

The view that consumers injured by an antitrust violation should always be able to bring suit was adopted by Justice Brennan in *dissent* in *Illinois Brick*. *See* 431 U.S. at 749 (Brennan, J., dissenting) (the antitrust laws "[were] clearly intended to operate to protect individual consumers who purchase through middlemen"). The Court rejected that approach in favor of the direct purchaser rule, even

---

tors have recognized that "the *Royal Printing* conspirator ownership exception should be recognized as abrogated by *Utilicorp*," but rather than overrule that decision, courts in the Ninth Circuit have "broadly expand[ed] the ownership or control exception." Lee F. Berger & Sophie J. Sung, *The Northern District of California Opens Its Doors to the World's Civil Antitrust Disputes*, 24 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 145, 151–52 & n.40 (2015).

though it was fully aware that the rule "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Id.* at 746 (majority op.); *see also UtiliCorp*, 497 U.S. at 211–12 ("Our decisions in *Hanover Shoe* and *Illinois Brick* often deny relief to consumers who have paid inflated prices because of their status as indirect purchasers."). The Court concluded that those costs are outweighed by the benefits of the direct purchaser rule, which prevents double recovery, significantly reduces the complexity of antitrust litigation, and creates the right incentives for appropriate enforcement of the antitrust laws.

Properly applied, *Illinois Brick* explains why respondents here are not entitled to sue. Apple is the alleged monopolist, so the question before the Court is who would be the proper plaintiff—the app developers or respondents, the ultimate consumers. Only one can be the direct purchaser, not both, because they have different relationships to the defendant. *See Illinois Brick*, 431 U.S. at 735; Brief for the United States as Amicus Curiae Supporting Respondents, *Kansas v. UtiliCorp. United, Inc.*, 497 U.S. 199 (1990) (No. 88-2109) ("a direct purchaser that suffers injury (and only the direct purchaser) is entitled to recover"). Here, the app developer bears the full burden of the alleged overcharge. By virtue of this position, the developer also has the opportunity to pass on some or all of that alleged overcharge to an app purchaser: the developer sets the price for an app, taking into account what the developer pays to Apple (in the form of a commission) for Apple's delivery service, and then charges the consumer. That is a classic example of passing on an overcharge.

The consumers, by contrast, *cannot* be the direct purchasers, because it would make no sense to say that they bear the full amount of Apple's allegedly monopolistic overcharge and then pass on those costs to the app developers. The app developers create the product (the apps) and set the price for it—the respondent consumers are in a *downstream* relationship from the app developers, and they do not pass on costs to anyone. Indeed, the consumers are the last link in the transaction, which is why *Illinois Brick* recognized that the direct purchaser rule will very often bar "the ultimate consumer" from bringing suit. 431 U.S. at 741.

2. As explained above, the direct purchaser rule is grounded in the desire to avoid double liability and efficiently manage antitrust litigation. In recent years, some have questioned whether such a strict rule is necessary to accomplish these aims. These critics have suggested that careful case management and increasingly sophisticated econometric tools can allow both direct and indirect purchasers to recover their actual damages without presenting serious traceability problems and the risk of double liability that they entail. *See, e.g.*, Deborah A. Garza, et al., *Antitrust Modernization Commission Report and Recommendations* 265–83 (Apr. 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

Whatever the merits of these arguments, it is indisputable that *actually* imposing double liability on antitrust defendants is impermissible. Yet the Ninth Circuit's decision all but admits that its rule will produce this result. The Ninth Circuit acknowledged that if "Apple sells distribution services to app develop-

ers[,] . . . this would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple." Pet. App. 20a. Nevertheless, the Ninth Circuit insisted that this "makes no difference to our analysis in the case now before us." *Id.* In other words, the Ninth Circuit expressly condoned multiple liability: It gave respondents the green light to sue even though the app developers would also be entitled to sue for the same alleged overcharge. Such an approach directly contravenes this Court's precedent. *See UtiliCorp*, 497 U.S. at 212 ("The *Illinois Brick* rule . . . serves to eliminate multiple recoveries.").

The consequences of allowing duplicative liability against every company that provides a platform to connect sellers with buyers cannot be understated. Even setting fundamental fairness to the side, multiple liability would upset the carefully crafted approach to antitrust enforcement that was devised by Congress. *See* Br. of the United States in *UtiliCorp*, *supra* ("the deterrence objective should be considered in light of incentives to sue and limiting the complexity of litigation"). The Ninth Circuit opened the door to *double recovery* of *treble damages* without considering one of the imperatives of the antitrust system: to "ensure that the overcharges will be paid only once to avoid over-deterrence." Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J. 167, 194 (2009).

C. The Ninth Circuit's Decision Will Have Especially Pernicious Effects On E-Commerce

The decision below will adversely affect the dynamic and evolving e-commerce marketplace. The rapid growth of this sector has spurred innovation as companies develop new models to provide a better user experience for manufacturers, retailers, and consumers. Such innovation will be hindered by the Ninth Circuit's significant expansion of the costs and risks of antitrust litigation.

Electronic retail sales are a substantial part of the global economy. They have grown at a double-digit rate for years, and are estimated to have reached $2.3 trillion—a full 10% of all retail sales—in 2017. *Worldwide Retail Ecommerce Sales Will Reach $1.915 Trillion This Year*, eMarketer (Aug. 22, 2016).[3] Smartphone apps, in particular, are an enormously significant part of e-commerce. Apple, Google, Microsoft, and other companies have all developed their own platforms to enable users to acquire apps. These platforms differ in some respects, but fundamentally they all operate by helping consumers locate and obtain app content. In some cases (but not all), the companies charge fees to the app developers for that service. And that service has enabled the content-creators who develop apps to enjoy unparalleled success: Just on the Google Play Store in 2016 alone, users of 900 million devices in 190 countries downloaded 82 billion apps. Vineet Buch, *I/O 2017: Everything new*

---

[3] https://tinyurl.com/y7n6c4tu.

in the Google Play Console, Android Developers Blog (May 17, 2017).[4]

Accompanying all of this growth is rapid innovation in distribution and marketing as companies experiment with how their platforms can best balance consumer choice, quality control, transparency and security, and price. Models similar to that used by Apple—online platforms that introduce sellers to buyers who would like to obtain concert tickets, apps, or other goods and services—may be favored by consumers because they may make transactions easier and more efficient. And those models also may benefit app developers and event promoters, who may spend less time locating customers and instead focus on what they do best: creating and improving app content and putting on terrific events.

The growth and innovation in this industry is directly threatened by the decision below. If the Ninth Circuit's reasoning stands, technology companies will face the threat of multiple treble-damages liability in actions brought by remote purchasers. The result of the Ninth Circuit's myopic focus on which party interacts most with the consumer will be to force companies to alter their business models in order to mitigate litigation risk, rather than focusing on how to achieve efficiencies or meet consumer preferences. The increased risk and cost of litigation will chill innovation, discourage commerce, and hurt developers, retailers, and consumers alike.

---

[4] https://tinyurl.com/mof3cns.

II. This Case Illustrates A Growing Problem In Antitrust Class-Action Litigation

Although this Court has held that Section 4 of the Clayton Act does not permit indirect purchasers to sue for treble damages, it has also clarified that "[t]he congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105–06 (1989). In response, more than 25 states have enacted statutes allowing indirect purchasers to sue under their own antitrust laws. *See* William B. Rubinstein, *Newberg on Class Actions* § 20:12 (5th ed. June 2018) (explaining that 26 states plus the District of Columbia allow indirect purchasers to sue on their own behalf, and six states allow their attorneys general to sue in *parens patriae* on behalf of resident indirect purchasers).

At first, these state-law actions largely remained in state court. But in 2005, Congress enacted the Class Action Fairness Act ("CAFA"), which lowered the bar to federal court by allowing a plaintiff who asserts only state-law claims to invoke federal diversity jurisdiction so long as (1) the claims are asserted on a class basis; (2) the amount in controversy exceeds $5 million; and (3) minimal diversity exists. 28 U.S.C. § 1332(d)(2). The potential impact on indirect purchaser claims was quickly noted. *See* Steven M. Puiszis, *Developing Trends With the Class Action Fairness Act of 2005*, 40 J. Marshall L. Rev. 115, 193 (2006) ("CAFA will also likely shift to federal court many indirect purchaser class actions filed under state antitrust laws."). And it did not take long for these predictions to materialize. As one commentator reported

just five years later, "[a]nother trend of increasing significance is the inclusion of state-law indirect purchaser claims in federal antitrust class actions," with "[p]laintiffs in 31 cases—over 25 percent of all cases filed in the past three years—assert[ing] indirect purchaser claims under state law." Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 Antitrust 58, 59 (Summer 2010). This trend has not abated. On the contrary, today "most indirect purchaser suits are now heard in federal court." Alexei Alexandrox, *Pass-Through Rates in the Real World: The Effect of Price Points and Menu Costs*, 79 Antitrust L.J. 349, 351 n.7 (2013).

Of course, there is nothing intrinsically problematic about this trend. And to the extent indirect purchaser claims can be asserted *somewhere*, as *ARC America* held they may, there are strong reasons for preferring that those claims be brought in a federal forum. *See* Garza, *Antitrust Modernization Commission* at 272 (noting the benefits of removing indirect purchaser actions from different state courts so they may be consolidated before a multidistrict litigation panel).

But the very same concerns about speculative damages and traceability that led this Court to bar indirect purchaser claims under Section 4 present serious obstacles to certifying these state-law claims under Rule 23. After all, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule" by establishing that "there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Ibid.* And a

class "may only be certified if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23[ ] have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis added).

It is exceedingly difficult for a putative class of indirect purchasers to meet this exacting standard. "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world rather than an economist's hypothetical model,' and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick*, 431 U.S. at 731–32 (quoting *Hanover Shoe*, 392 U.S. at 493). And "the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution" because "[t]he demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff." *Id.* at 732–33.

Nor have advances in econometric sophistication offered a cure for the fundamental problems of commonality and predominance that indirect purchaser *class actions* present vis-à-vis calculating pass-on damages. While it is evident that a "damage scenario becomes less persuasive when it must account for the behavior of more actors," it is equally true that the manufacturers, distributors, and consumers that are all relevant to determining pass-on injury "are not automata that respond uniformly to a changed condition

like a price increase." William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 Antitrust L.J. 1, 11 (1999).

Thus, as one court has explained, indirect purchasers "have a 'double burden' at trial; they must first prove common impact on direct purchasers who bought [a monopolized good] from the Defendants, and then show that impact was passed through to the indirect purchaser class." *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 682 (S.D. Fla. 2012) (denying class certification); *see also* Rubinstein, *Newberg on Class Actions* § 20:53 (discussing the "palpable predominance concern in indirect purchaser suits concern[ing] the dual level of purchases"). And even if commonality and predominance can be shown, producing an acceptable damages model presents another high hurdle for plaintiffs. *See In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 504 (N.D. Cal. 2008) ("Because of the large number of manufacturers, resellers, and products at issue here, [plaintiff's expert] was forced to use different variables in each of her reseller-specific regressions.").

Yet courts *are* certifying indirect purchaser classes—notwithstanding the very problems of traceability and speculative damages that this Court has cautioned against. For example, in *In re Polyurethane Foam Antitrust Litigation*, 314 F.R.D. 226 (N.D. Ohio 2014), the court certified a class of "individual consumers and 'authorized managing agents' for hotels and other entities operating in various states . . . who purchased products containing flexible polyurethane foam . . . not for resale." *Id.* at 232. This foam was used in widely divergent products purchased by class

members, including "(1) carpet underlay; (2) 'bedding (*i.e.*, mattresses, pillows, and toppers)' and; (3) 'upholstered furniture products, including upholstered sofas and chairs.'" *Id.* at 234. And the plaintiffs' expert acknowledged that "[t]here are 'links' in the distribution chain separating indirect purchasers from direct purchasers." *Id.* at 280. Nevertheless, the court explained that the expert need only "use [ ] simple arithmetic to calculate passthrough,'" *id.*, and proceeded to certify the class.

Similarly, in *In re Flonase Antitrust Litigation*, 284 F.R.D. 207 (E.D. Pa. 2012), the court certified three indirect purchaser classes covering different time periods and claims. *See, e.g.*, *id.* at 216 (defining one class to include "[a]ll persons or entities . . . who from August 2004 through March 2006 purchased, paid for, and/or reimbursed for branded Flonase," and "*also* purchased, paid for, and/or reimbursed [a generic FP] from March 2006 to March 2009 in the same designated state in which the Flonase purchase was made"). As in the foam litigation, the court relied heavily upon an expert who opined that through a "yardstick methodology . . . he can demonstrate that across all types of end-payors and all distribution channels, injury and damages occurred in this case as a result of GSK's delaying generic entry." *Id.* at 220. The court accepted this approach despite its obvious—and acknowledged—flaws: "I am satisfied that although the magnitude of overcharges will vary across class members, Indirect Purchasers have set forth a just and reasonable estimate of the class-wide overcharge damages." *Id.* at 223.

And here, respondents seek to represent a class that includes "[a]ll persons . . . who purchased an iPhone anywhere in the United States at any time, and who then also purchased applications from Apple from December 29, 2007 through the present." J.A. 56–57. But app developers adopt a wide variety of pricing practices. Some app developers do not charge users at all, preferring to fund their operations through advertising; the alleged monopolistic practice here might *encourage* such a model—which causes respondents no cognizable injury—because the App Store does not take a commission in these circumstances. Other app developers may adopt a mixed pricing strategy, using a combination of up-front charges to purchase their apps in the first instance, and additional charges later if a consumer makes in-app purchases to access premium features or content. Even among this latter class of app developers, some have chosen to charge the same amount across app platforms, while others have expressly charged more for apps purchased through the Apple Store—a clear example of pass-on. *See* Ed Shelley, *The State of Subscriptions on the App Store* (ChartMogul Feb. 5, 2018) ("Spotify premium costs $9.99 monthly if you subscribe on the web, but $12.99 monthly if you purchase through the App Store. This is a prime example of the business passing the Apple Tax down to consumers.").[5]

The fundamental premise underlying *Illinois Brick* is that complicated inquiries into pass-on injuries need not—and ought not—be undertaken on a case-by-case basis. Rather, "even assuming that any economic assumption underlying the *Illinois Brick*

---

[5] https://tinyurl.com/yb4casa8.

rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *UtiliCorp*, 497 U.S. at 217. These concerns apply with special force to indirect purchaser class actions.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted.

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062-2000
(202) 463-5337

THEODORE J. BOUTROUS JR.
Counsel of Record
DANIEL G. SWANSON
THEANE EVANGELIS
SAMUEL ECKMAN
ELIZABETH DOOLEY
GIBSON, DUNN & CRUTCHER LLP
Los Angeles, CA 90071-3197
(213) 229-7804
tboutrous@gibsondunn.com

Counsel for Amicus Curiae

August 17, 2018